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No. 82-1825

In the Supreme Court of the United States

OCTOBER TERM, 1982

FLORIDA TILE COMPANY, DIVISION OF SIKES CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the finding of the National Labor Relations Board that petitioner reprimanded and discharged an employee because of her union activity and not for the reasons advanced by petitioner.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is reported at 692 F.2d 34. The decision and order of the National Labor Relations Board (Pet. App. 3a-21a) are reported at 255 N.L.R.B. 360.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1982. A petition for rehearing was denied on February 7, 1983 (Pet. App. 22a). The petition for a writ of certiorari was filed on May 9, 1983 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 2-3.

STATEMENT

1. Petitioner is engaged in the manufacture and distribution of tile. Connie Beavers was employed as a tile sorter at petitioner's Lawrenceburg, Kentucky plant from November 12, 1977, until her discharge on March 23, 1979. In January 1979,[1] Beavers became involved in an organizational campaign on behalf of the United Steelworkers of America, wearing a union button at work, passing out union pamphlets, and securing signatures of her fellow employees on union authorization cards (Pet. App. 6a-7a; A. 74-77).[2]

On Monday, March 19, at about 4:30 a.m., after they had completed working the third shift (6 p.m. to 4:30 a.m.), Beavers and another employee, Nancy Caudill, were soliciting signatures on union authorization cards in the women's locker room. When they asked employee Pat Humphrey if she would sign a card, Humphrey expressed some reluctance, explaining that her husband did not want her to sign. Nevertheless, on further urging, Humphrey took a card and knelt down with a pen in her hand when another employee, Joan Newton, walked in and advised Humphrey not to sign the authorization card. Beavers protested the intervention, vulgar remarks were exchanged, and Humphrey and Newton left without signing the cards (Pet. App. 7a-9a; A. 77-78, 80, 175-177, 386-387, 394-395, 419).

Notwithstanding this interchange, Humphrey and Newton, who were in a car pool with Beavers, planned to drive Beavers to work Monday night, but they missed connections and Beavers drove herself (Pet. App. 9a; A. 81, 389-390). In the meantime, Humphrey and Newton had reported their argument with Beavers over the union card to the shift supervisor. At the beginning of the Monday night shift,

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[1] All dates refer to 1979 unless otherwise indicated.

[2] "A." refers to the appendix in the court of appeals.

Humphrey, Newton and the supervisor went to discuss the matter with the production manager, who in turn summoned the plant manager (A. 258-262, 360-364, 390, 420-421).

On the production line that night, Beavers complained to her co-workers, Valerie Brock and Charlie Smith, that "people who go tell about the Union and 'stuff like that ought to have their butt kicked' " (Pet. App. 11a; A. 344, 346, 356-357). Beavers also said that Humphrey had been playing up to employee Paul Satterly and had gone on a date with him at 3 or 4 in the morning, but that, when Satterly had made sexual advances, Humphrey had resisted them (Pet. App. 11a-12a; A. 343-344, 346).[3] Beavers also asked Charlie Smith, who was friendly with Humphrey, if he thought Humphrey was "all right." He answered that he thought she was "pretty good," and Beavers replied that she " 'wouldn't touch Pat Humphrey with a 10 foot pole because she was scared she might have VD' " (Pet. App. 11a; A. 345).

The conversation between Beavers and her co-workers was not within hearing range of Newton or Humphrey (Pet. App. 10a, 15a; A. 87-88). Smith, however, relayed Beavers' remarks to Newton and Newton reported them to Humphrey, who again complained to the shift supervisor (Pet. App. 10a-12a; A. 88, 364-366, 428-429). Beavers was then summoned to the supervisor's office and told that Humphrey and Newton were very upset and that she was suspended and should go home while the matter was being investigated. Beavers was not asked for her version of the incidents, and she was escorted out of the plant by a guard (Pet. App. 10a; A. 89-90, 367).

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[3]Humphrey acknowledged that she had gone on a date with Satterly (Pet. App. 12a n.6; A. 410).

On Tuesday, Wednesday and Thursday of that week, petitioner's production manager and plant manager took a total of 11 written, witnessed and notarized statements about the events of Monday from Humphrey, Newton, and four other people, including the shift supervisor (A. 265-266, 272-273, 292-294, 530-538, 540-541). No statement was taken from Beavers or Caudill, the other pro-union employee, during this three-day period. On Friday morning, Production Manager Bob McFarland finally took a statement from Caudill, in which she told him that Newton also had used vulgar language during the locker room exchange with Beavers (Pet. App. 12a n.7; A. 325-326, 539). Later that day, McFarland telephoned Beavers and told her to report to the plant because "they want[ed] to hear * * * [her] side of the story now" (Pet. App. 10a; A. 92-93).

After Beavers had appeared and had given her version of the story to McFarland and the shift supervisor, McFarland opened his desk drawer, removed two yellow warning slips, and placed them on the desk (Pet. App. 11a; A. 93-94). One warning slip was for "harassing & badgering another employee to do something against her will" and the other was for "making vicious & malicious statements about a fellow employee" (Pet. App. 11a; A. 94, 519-520). When Beavers protested that McFarland already had made up his mind to fire her before he had even heard her side of the story, McFarland replied, " 'Well, we went over the case real well and we both decided that you deserve a yellow slip for each incident' " (Pet. App. 11a; A. 94-95).[4] No other employee was disciplined for participating in the events of March 19 (Pet. App. 14a).

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[4]Under company policy, three yellow warning slips in one year result in automatic discharge of the employee (Pet. App. 12a n.8; A. 43). Since Beavers previously had received a yellow warning slip for absenteeism, the effect of petitioner's giving her two warning slips for the Monday incidents was to discharge her (Pet. App. 12a n.8; A. 127-128, 571).

2. The Board, adopting the decision of the Administrative Law Judge, held that petitioner had violated Section 8(a)(1) and (3) of the Act by reprimanding and discharging Beavers because of her union support and activities (Pet. App. 3a-19a). The Board concluded that the reasons advanced by petitioner for the discipline — " 'harassing and badgering another employee to do something against her will' " and " 'making vicious and malicious statements' about a fellow employee" (*id.* at 15a) — were pretextual (*id.* at 13a-16a).

In finding that petitioner's true motive was anti-union, the Board noted (Pet. App. 13a & n.8) that, in the first incident, Beavers was engaged in the protected, concerted activity of soliciting union authorization cards after working hours in a nonworking area. The Board held that Beavers' conduct on that occasion could not properly be characterized as "harassing and badgering another employee against her will" (*id.* at 15a),[5] observing that, although Beavers concededly had used profanity, such language was in widespread, everyday use in the plant and that petitioner had not disciplined Newton although it knew that she had used similar language during the same confrontation (*id.* at 13a-14a). The Board also noted that when Humphrey and a fellow employee had engaged in a much more serious confrontation on another occasion, which had resulted in the two employees "slugging it out" on the ground in the parking lot, petitioner had given both employees warning slips,

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[5]Although the Board found that petitioner was motivated solely by anti-union considerations, rather than by any concern for Beavers' treatment of Humphrey, it is clear that Beavers' conduct was not so outrageous as to exceed the bounds of protected activity under the Act. Hence, even if the profanity Beavers employed in soliciting signatures on the union cards had been the real reason for petitioner's discharge of her, it would have been an unlawful basis for that discipline. See *NLRB* v. *Cement Transport, Inc.*, 490 F.2d 1024, 1030 n.7 (6th Cir.), cert. denied, 419 U.S. 828 (1974), and cases cited therein.

"rather than singling out one as it did in the case of Beavers" (*id.* at 14a, 15a; A. 401-402, 413-414, 569-570). The Board concluded (*id.* at 14a) that "the apparent equal treatment by [petitioner] in that case resulted from the absence of union activity as a factor."

In addition, the Board found that the separate warning petitioner gave Beavers for "making vicious and malicious statements" represented an attempt by petitioner to elevate what was really a continuation of the same quarrel into an independent ground for discharge (Pet. App. 15a-16a). It observed (*id.* at 15a & n.10) that Beavers' remarks about Humphrey and co-worker Satterly were not alleged to be untrue and "appeared to be of the type that everyone at some time or other is subjected to because of sometimes unavoidable social and business contacts"; that Beavers' remarks were made to other co-workers, out of hearing range of Newton and Humphrey; and that nothing would have come of the comments if Newton had not learned of them and repeated them to Humphrey (*id.* at 15a). The Board accordingly concluded (*id.* at 16a) that petitioner's "entire conduct in this matter was illegally motivated" and that the warnings and discharge of Beavers were "because of her union activity and not for the reasons given by [petitioner]."

3. The court of appeals affirmed the Board's findings and enforced its order (Pet. App. 1a-2a). It noted (*ibid.*) the company rule that authorized the discharge of an employee who received three disciplinary slips in one year; that Beavers had received only one disciplinary slip before the union campaign began; and that, after Beavers had become active in the campaign, she had received two disciplinary slips at the same time, arising out of incidents that had occurred on the same day. The court further observed (*id.* at 2a) that both incidents had involved the use of profanity and found it "significant that two other employees, Ms. Joan Newton

and Ms. Pat Humphrey, who opposed the Union and had used profanity in making derogatory statements, were not disciplined by the Company." The court concluded that this disparate treatment supported the Board's finding of unlawful motivation (*ibid.*).

ARGUMENT

Contrary to petitioner's contention (Pet. 9-10), this case does not present "a significant practical question concerning the proper allocation * * * of proof in Section 8(a)(3) cases" subsumed in the *Wright Line*[6] issue that is currently pending before this Court in *NLRB* v. *Transportation Management Corp.*, No. 82-168 (argued Mar. 28, 1983). Under the *Wright Line* test, if the Board's General Counsel has established that opposition to an employee's protected activities was "a 'motivating factor' " in the employer's decision to discharge the employee, the employer can prevail only by showing by a preponderance of the evidence that it would have taken the same action "even in the absence of the protected conduct." 251 N.L.R.B. 1089 (footnote omitted). The First Circuit rejected the *Wright Line* test insofar as it places on the employer the burden of proving, rather than merely producing evidence, that it would have taken the same action for legitimate reasons. *NLRB* v. *Wright Line, a Division of Wright Line, Inc.*, 662 F.2d 899, 904-905 (1981), cert. denied, 455 U.S. 989 (1982). Accord, *NLRB* v. *Transportation Management Corp.*, 674 F.2d 130 (1st Cir. 1982), cert. granted, No. 82-168 (Nov. 15, 1982).

The burden-shifting aspect of the Board's test, which is at issue in *Transportation Management*, however, applies only where it has been shown that the employer has two

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[6] *Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982).

motives, one lawful and one unlawful.[7] Here, by contrast, the Board found that petitioner's sole motive was anti-union and that the reasons advanced by petitioner for the discipline were mere pretexts. Contrary to petitioner's assertion (Pet. 24), the Board did not arrive at this conclusion by requiring petitioner to "prove, by a preponderance of the evidence, that it was actually motivated by the reasons advanced." Rather, as in the typical Board proceeding described in the Board's reply brief in *Transportation Management* (at 3), the General Counsel attempted to prove both that petitioner had discharged Beavers for an unlawful reason and that petitioner's proffered legitimate reasons were pretextual. The Board and the court of appeals sustained both contentions; and there is no indication in the decision of either that it did so by placing the burden on petitioner to prove that its proffered reasons were not pretextual (see Pet. App. 1a-2a, 13a-16a). Consequently, the court of appeals had no occasion to address the issue that is pending before this Court in *Transportation Management* — whether the Board may place on an employer that has both a lawful and an unlawful motive for imposing discipline the burden of proving that it would have taken the same action even absent the unlawful motive.

This case thus is no different from numerous other cases in which the courts of appeals have concluded that the Board's findings of unlawful discrimination should be sustained irrespective of the validity of the burden-shifting aspect of the Board's *Wright Line* test. For example, although the First Circuit has expressed disagreement with that feature of *Wright Line*, it nonetheless has affirmed

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[7]Indeed, in *Wright Line* itself the First Circuit enforced the Board's order because it agreed that the alleged legitimate reason for the discharge in that case was a pretext. *NLRB* v. *Wright Line*, *supra*, 662 F.2d at 907 n.13.

Board findings of anti-union discrimination where the Board did not decide the case "upon the niceties of burdens of proof" but, rather, "found evidence of anti-union motive and then went on to find that the employer's allegedly legitimate reason for the discharge was a pretext." *NLRB* v. *Magnesium Casting Co.*, 668 F.2d 13, 16 (1st Cir. 1981). Accord, *NLRB* v. *Steinerfilm, Inc.*, 669 F.2d 845, 850-851 (1st Cir. 1982).[8] This Court recently has declined to review three such cases, in which the petitioners had contended that the Board's conclusion that their assertedly legitimate reasons for the challenged discipline were pretextual involved an application of the Board's *Wright Line* test. *American Geri-Care, Inc.* v. *NLRB*, cert. denied, No. 82-1456 (Apr. 25, 1983); *Brewton Fashions, Inc.* v. *NLRB*, cert. denied, No. 82-1209 (Apr. 4, 1983); *Pettibone Corp.* v. *NLRB*, cert. denied, No. 81-2116 (Oct. 4, 1982).

Accordingly, the only issue that is presented by the petition is whether substantial evidence supports the Board's conclusion that petitioner's asserted lawful reasons for the discharge were pretextual and that its true motive was unlawful. That evidentiary issue does not warrant further review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

In any event, the court of appeals properly concluded that the Board's findings were supported by substantial evidence. Petitioner's discharge of Beavers arose out of an

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[8]See also *Royal Development Co.* v. *NLRB*, 703 F.2d 363, 370-372 (9th Cir. 1983); *Marathon LeTourneau Co.* v. *NLRB*, 699 F.2d 248, 252 & n.3 (5th Cir. 1983); *NLRB* v. *American Geri-Care, Inc.*, 697 F.2d 56, 63-64 (2d Cir. 1982), cert. denied, No. 82-1456 (Apr. 25, 1983); *L & M Radiator, Inc.* v. *NLRB*, 696 F.2d 76 (8th Cir. 1982); *Standard-Coosa-Thatcher Carpet Yarn Division, Inc.* v. *NLRB*, 691 F.2d 1133, 1142-1143 nn.9 & 10 (4th Cir. 1982), cert. denied, No. 82-1261 (Apr. 18, 1983); *NLRB* v. *Carbonex Coal Co.*, 679 F.2d 200, 204 (10th Cir. 1982).

incident involving protected union activity (*supra*, page 5 & note 5); she was singled out for discharge although an anti-union employee had used comparably profane language on the same occasion and although such language was commonplace in the plant (*supra*, pages 5-6);[9] and petitioner's investigation of Beavers' conduct was slanted to document a basis for discharging her and to overlook the other employee's conduct (*supra*, pages 4, 6).[10] In these

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[9]Petitioner's assertion (Pet. 25-26 n.22) that "all the witnesses present in the locker room on the morning of March 19 * * * uniformly agreed that they had never heard an employee use such vicious profanity in the flagrantly hostile and intimidating fashion that Beavers employed on that morning" is misleading. Employee Caudill, who was a witness to the confrontation in the locker room, credibly testified that she was not embarrassed by the language used, as she "hear[d] that [around the plant] everyday" (A. 184-185, 190-192). Caudill's testimony concerning the prevalence of the use of such language in the plant was corroborated by that of other witnesses (A. 98-100, 229, 354), which also was credited by the Board (Pet. App. 13a-15a). Moreover, although Humphrey initially testified that it was "the first time" she had "ever heard anyone cuss somebody like that" (A. 400), she conceded on cross-examination that she had called another employee a "whore" in retaliation for an epithet the employee had applied to her and that she also had accused the other employee of "shacking up" (Pet. App. 14a; A. 401-402, 413). Similarly, although Newton had testified that "people just don't cuss people like * * * [Beavers] did" on that occasion (A. 434), the Board credited testimony that Newton, on the same occasion, had told Beavers to shut her "fucking mouth" (Pet. App. 9a & n.4; A. 78, 177).

[10]Although Production Manager McFarland testified that he had no facts showing Newton or Humphrey to be at fault, he admitted that Caudill had told him about Newton's use of profanity (Pet. App. 12a & n.7; A. 308, 325-326). McFarland asserted, however, that he was unable to question other employees concerning Caudill's report because her statement was taken last (A. 325-326). In further contrast to its treatment of Beavers, petitioner merely counseled two employees who, on another occasion, had a confrontation that involved physical contact as well as a verbal threat (A. 207-210, 224-228, 458-460).

Petitioner's attempt to defend its conduct in this case by asserting (Pet. 26) that, "prior to Beavers' discharge, it had discharged a pro-company employee while retaining a pro-union employee," cannot

circumstances, the Board reasonably concluded that petitioner had seized upon the occasion of Beavers' dispute with Humphrey and Newton as an excuse for issuing two warning slips to Beavers, thus triggering the automatic discharge of a vigorously pro-union employee (Pet. App. 13a-16a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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succeed. In the incident to which petitioner apparently refers, the "pro-company employee" had struck the pro-union employee, who was asking him to sign a union authorization card (A. 282-283). Both employees were suspended during the investigation, and the pro-union employee was suspended for another week for "agitating" the other employee to sign a union card and calling him "a back stabber" (A. 283-288). In any event, "the mere fact that all union members or supporters are not discharged[] does not disprove the fact that an employee's discharge is based upon an unlawful discriminatory motive." *NLRB* v. *Challenge-Cook Brothers*, 374 F.2d 147, 152 (6th Cir. 1967).